Unauthorized Agency

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Abstract: This paper seeks to provide an overview of the project which led to publication of the book *The Unauthorised Agent: Perspectives from European and Comparative Law*, published by Cambridge University Press in 2009. Broadly speaking, the project concerned the problems caused by agents who act in an unauthorized manner and the legal concepts used to tackle those problems. These issues are analysed in the context of different national legal systems within the European Union and beyond. Drawing on the national chapters, the authors provide a detailed comparative analysis. Within this context, they assess whether a common law/civil law divide exists, and also analyse the contribution made by mixed legal systems. Finally, the book assesses the approach of international instruments such as the Principles of European Contract Law (PECL) and the Unidroit Principles of International Commercial Contracts.

1. Overview of the Book

1.1 Introduction

This paper seeks to provide an overview of the project which led to publication of the book *The Unauthorised Agent: Perspectives from European and Comparative Law*, published by Cambridge University Press.[1] Broadly speaking, the project concerned the problems caused by agents who act in an unauthorized manner and the legal concepts used to tackle those problems. These issues are analysed in the context of different national legal systems within the European Union and beyond.[2] Further chapters contributed by one of the editors analyse those same issues in the context of the Principles of European Contract Law (PECL)[3] and the UNIDROIT Principles of International Commercial Contracts (UP).[4] In the final section of the book, the

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1 D. Busch & L.J. Macgregor, *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge: Cambridge University Press, 2009).

2 The actual legal systems studied are identified in s. 3 below.

3 See for the text of the PECL, including comments and comparative footnotes: O. Lando & H. Beale (eds), *Principles of European Contract Law. Part I: Performance, Non-performance and Remedies* (Dordrecht/London/Boston: Martinus Nijhoff Publishers, 1995); Lando & Beale (eds), *Principles of European Contract Law. Parts I and II* (The Hague/London/Boston: Kluwer Law International, 2000); O. Lando et al. (eds), *Principles of European Contract Law. Part III* (The Hague: Kluwer Law International, 2003). The text of the PECL is also available at <http://frontpage.cbs.dk/law/commission_on_european_contract_law/Skabelon/pecl_engelsk.htm>.

4 See for the UP with commentary: *UNIDROIT Principles of International Commercial Contracts 2004* (Rome: International Institute for the Unification of Private Law, 2004), 75–76. The full text of the UP with commentary is also available at <www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

editors contributed a comparative analysis and chapter of comparative conclusions, drawing on the material found in the other chapters.

1.2 Focus of the Book

To select unauthorized agency as the focus of the book is, of course, to analyse part only of agency law. It is important to explain why this particular part was selected. There are two (interconnected) reasons underlying the editors' choice. The first is the frequent tendency of agents to act in an unauthorized manner. This point is underlined by the wealth of case law on unauthorized agency found in each of the national legal systems examined in the book. Unauthorized agency is clearly an unavoidable fact of commercial life. When acting without authority, sometimes agents have fraudulent intentions, but this is not necessarily the case. Agents sometimes act honestly but erroneously, believing that they are, in fact, authorized.

There may be many reasons why agents are tempted to act without authority. An agent is usually paid on commission, and is therefore likely to apply all his efforts towards the creation of a contractual relationship between his principal and a customer (the latter being referred to here as a 'third party'). The need to obtain commission may lead to a tendency to overstep the boundaries of authority. This tendency may be more pronounced in times of economic hardship. An agent may take a risk, knowing that he is unauthorized and thus unable to form a contract between principal and third party. Nevertheless, he may hope that the principal, once appraised of the terms of the contract, will ratify, and thus validate, the unauthorized contract. The agent's prediction may turn out to be inaccurate. It may be that the principal would never have agreed to enter into a contract on those terms. Alternatively, in the period intervening between the agent's act purporting to enter into a contract and the principal being appraised of all the details, the price of the goods or services may have fallen in comparison to the contract price. The proposed contract then becomes an unattractive prospect for the principal.

The second reason underlying the choice of focus has been alluded to immediately above. The consequences of acting in an unauthorized manner are draconian. All the national legal systems studied adopt the same general rule, which is that the unauthorized agent is unable to form a contract between principal and third party. The agent therefore fails to achieve the essential goal of agency. Too rigid adherence to this general rule would have adverse practical consequences. Where the principal/third party contract is invalid, the impact will be felt beyond the immediate context of those contracting parties. The unravelling of this contract could threaten further contracts and the transfer of title to property effected through those contracts. Without modification, this general rule would result in unacceptable consequences which would act to threaten the security of commercial transactions. It is not surprising, therefore, to see the development of exceptions to the general rule in the national legal systems studied. Those exceptions, which are identified below, are fully analysed in the book. They are grouped by the editors under three main headings:

apparent/ostensible authority, ratification, and the liability of the *falsus procurator*.[5] The book analyses the interaction between the general rule and the exceptions in each legal system studied.

1.3 Aims of the Book

Having outlined the focus of the book, the question that arises is the editors' aims in undertaking this project. Identification of those aims requires reference to the European context within which the book has been published. It is now common to speak of a distinct discipline of European contract law.[6] Within this heading, one might group the legal rules emanating from the European Union, which have an impact on national contract law.[7] However, that general heading would also encompass academic initiatives which seek to identify either a common core of European contract law, or possibly propose a model law of contract for use within Europe. Recent years have seen the development of PECL into the Draft Common Frame of Reference (DCFR).[8] The DCFR is clearly intended to play a different role compared to PECL. The DCFR is intended principally to act as a toolbox or dictionary for European legislators. If it is developed into a CFR rather than a DCFR, it should help to ensure that future European directives are more coherent and consistent in their use of language and legal concepts.

It is within this European context that our book on unauthorized agency has been published. The editors aim to assess whether there is, in fact, a common core of agency law already in existence in Europe. At the time of submission of the manuscript to Cambridge University Press, the DCFR was not available to us. As a result,

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[5] This latter term may be unfamiliar to common lawyers. In those systems, the phenomenon is known as the agent's breach of warranty of authority.

[6] The discipline has an expanding literature, see, for example, M. Hesselink, *An Introduction to European Contract Law*, to be published later this year by Hart Publishing.

[7] The following list is not intended to include all EU measures having an effecting on national contract law, but rather some of the more significant ones:

(a) Directive 1985/577/EC on Doorstep selling (1985 OJ L 372, 31 Dec. 1985, 31–33).
(b) Directive 1986/653/EEC on Commercial Agents (1986) OJ L 382, 31 Dec. 1986, 17–21.
(c) Directive 1993/EEC on Unfair Terms in Consumer Contracts (1993 OJ L 95, 21 Apr. 1993, 29).
(d) Directive 1997/7/EC on Distance Selling (1997 OJ L 144, 4 Jun. 1997, 19).
(e) Directive 1999/44/EC on Sale of Consumer Goods and Associated Guarantees (1999 OJ L 171, 7 Jul. 1999, 12).
(f) Directive 2000/31/EC on Electronic Commerce (2000 OJ L 178, 17 Jul. 2000, 1).
(g) Directive 2005/29/EC on Unfair Business to Consumer Commercial Practices (2005 OJ L 149, 11 Jun. 2005, 22).

Directives (a) and (c) to (e) are likely to be replaced by a proposed Directive on Consumer Rights, see <http://ec.europa.eu/consumers/rights/docs/Directive_final_EN.pdf>.

[8] E. Clive, C. von Bar, & H. Schulte-Nolke, *Principles, Definitions and Model Rules of European Private Law: An Outline Edition* (Munich: Sellier, 2009).

PECL rather than the DCFR is the main point of reference in the book. This conference therefore provided an important opportunity to develop the conclusions of the book by reference to the DCFR. We are grateful that the Chair of the conference, Professor Reinhard Zimmermann, succeeded so elegantly in fulfilling this role. We hope that the material contained in the book and in these conference papers will assist those seeking to develop the parts of the DCFR relevant to agency.[9] We have provided those authors with a picture of the common core, and with suggestions on how to develop the law.

Thus far, the editors' aims have been explained purely in a European context. Coverage in the book extends beyond Europe. A later section of this paper identifies the legal systems outside Europe, which were included in the project, and the reasons why we thought it useful to include them.

This discussion of the aims of the book would be incomplete without identifying a further, substantive, point. The editors identified the third party as deserving of particular attention in the tri-partite agency situation. Essentially, the third party is an 'outsider' to the agency relationship. This may be because he has no choice but to contract using an agent: the goods or services may only be available in this way. Perhaps more significantly, compared to the principal and agent, he suffers from an information asymmetry: he is unable to access the information that he needs in order to check the agent's authority. This information is vital to him because it allows him to assess whether he does indeed have a contract with the principal. It is, however, usually only available to the principal and the agent. For these reasons, the editors considered that the third party is deserving of special treatment.[10] Drawing on the national legal systems analysed, they were able to propose rules which they suggested might offer to the third party an optimum level of protection, whilst ensuring, at the same time, fairness to the principal and agent. The focus on the third party in particular involved analysis from an economic perspective, assessing issues such as the transaction costs involved in placing the burden of losses caused by unauthorized agents on the principal or on the third party.[11]

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[9] Principally, Book II Contracts and other juridical acts, Ch. 6: Representation; Book III Obligations and corresponding rights, Ch. 5: Change of parties; and Book IV Specific contracts and the rights arising from them, Part D: Mandate contracts.

[10] See the interesting discussion of the balance to be struck between, on the one hand, the interests of principal and agent, and, on the other, the interests of the third party, by G. McMeel, 'Philosophical Foundations of the Law of Agency', LQR (2000): 387 at 400–401. He likens agency law in this respect to modern contract law, which he describes (at 400) as '... at its core consensual but it is supplemented by principles which protect injurious reliance'.

[11] It is, of course, the agent who is usually at fault in causing such losses. As discussed below, in the legal systems studied the third party does indeed have an action against the agent for recovery of his losses. However, often the agent is the financially weakest party of the three actors involved. As a result, one can often find in relevant cases an assessment of whether principal or third party is better able to bear the loss.

2. The Three Aspects of Unauthorized Agency: Apparent Authority, Ratification, and the Liability of the *Falsus Procurator*

2.1 General

Having set out our general aim, we can now descend to a more particular level. As stated at the beginning of this overview, the general topic of unauthorized agency has been split into three particular concepts: apparent authority, ratification, and the liability of the *falsus procurator*.

2.2 Apparent Authority

The first of these, apparent authority, becomes relevant where a principal, whether actively or passively, leads a third party to believe that his agent is authorized when this is not, in fact, the case. At a later stage, the principal seeks to deny the appearance of authority, and therefore the existence of any contractual tie with the third party.

Although the national forms of apparent authority differ, they all share the same general effect: the principal is prevented from relying on the agent's lack of authority. The third party therefore has a claim against the principal for the protection of his expectation interest.[12]

This constitutes, however, only a limited degree of protection. It exists only where it can be proved that the principal is 'at fault' in the creation of the incorrect impression on the side of the third party. Where fault cannot be proved, for example, because the third party relied on the *agent's* representations rather than on the *principal's* representations, the third party has no claim against the principal. The results of this rather limited approach appear to have been unsatisfactory. In many of the legal systems analysed in our book, one can find attempts to extend the principal's liability. One of the most interesting issues arising from our comparison is the identification of different methods used by each legal system in order to extend liability on the part of the principal in cases of apparent authority.[13]

2.3 Ratification

The second of the three central concepts, ratification, poses similar, if perhaps less serious, concerns. Again, the agent purports to enter into a contract on behalf of his principal whilst possessing insufficient authority. In contrast to apparent authority cases where the principal rejects the contractual tie, ratification enables him to validate an otherwise non-binding contract. The consent of the principal is present, albeit that it is provided at a later stage.

Ratification poses fewer problems also because it tends to operate in the third party's favour: it validates a contract which the third party, all along, has considered

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[12] Busch & Macgregor, 392–395.

[13] Busch & Macgregor, 395–399.

to be binding. Importantly, however, the principal cannot be forced into ratifying. This statement must be qualified given that, in some of the systems analysed, the third party has important powers which can be used to force the principal to confirm whether or not he intends to ratify within a reasonable time.[14]

A particularly difficult issue in this context is the case of the third party who intends to be bound, but, having discovered the agent's original lack of authority, seeks to withdraw unilaterally from the purported contract. The problem arises in part due to the retrospective effect of ratification, an idea shared by all the legal systems studied.[15] Effective ratification creates a valid contractual nexus between principal and third party backdated to the moment when the agent purported to act on the principal's behalf. To give to ratification its full retrospective effect is to deny the third party the right to withdrawal, even if he purports to do so prior to the principal's act of ratification.

The clash of interests between the principal and third party in this situation is a difficult one to resolve. The starting position is, we would suggest, the backdrop of the third party's information asymmetry. Because the third party is initially disadvantaged, cogent arguments are required in order to prevent him withdrawing from what is not a valid contract at the time of withdrawal. Nevertheless, there are arguments against a right to withdraw as well. The third party could be accused of 'playing the market', that is, rejecting a contractual relationship which has, with the passage of time, become unattractive. There is no extra factor such as undue influence which would justify his withdrawal. The right to withdraw, in general, threatens one of the major functions of contract law. Contracts allow parties to assess future risks at the moment of formation and thus to achieve certainty through their agreement.

It is also necessary to consider parties situated outside the immediate tripartite situation. Others, so-called 'fourth parties', may be equally unaware of the agent's lack of authority, yet equally reliant on the validity of the principal/third party contract. To 'unravel' that contract could send ripples out into the commercial world, upsetting contractual relationships and, potentially, transfers of ownership of property. Such consequences clearly ought to be avoided.

The attitude of a particular legal system to the third party's right to withdraw is a particularly significant issue. It acts as a 'barometer', measuring the extent of third party protection within that particular legal system.

2.4 Liability of the Falsus Procurator

Thus far, the discussion has been limited to the choice of principal or third party as the most appropriate bearer of losses. It may seem unusual to omit the agent, usually

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[14] Busch & Macgregor, 123 (s. 177(2) German *Bürgerliches Gesetzbuch*), 159–160 (Art. 3:69(4) Dutch *Burgerlijk Wetboek*), 373–374 (Art. 2.2.9(2) UP).

[15] Busch & Macgregor, 412–413.

the most blameworthy party in this context. All of the systems studied recognize an action which can be raised by the disappointed third party against the unauthorized agent.[16]

It is curious, however, to note its lack of importance, particularly in English and Scots law. It seems to be seldom used, and, as a result, its rationale has not been clearly worked out. It is not clear why this action should have such a low profile. It may simply be a reflection of the fact that the principal tends to be in a stronger position financially, and therefore a more attractive target for the third party. Alternatively, the agent may simply have disappeared.

This action is generally discussed under the heading of 'the liability of the *falsus procurator*' in continental Europe and 'breach of warranty of authority' in the common law and mixed legal systems. With this concept, we move into new territory. No actual contract exists between third party and agent. The legal systems studied must therefore 'construct' a legal basis for the action. The legal systems studied have tended to favour the use of either an implied unilateral undertaking or an implied contract. Both of these solutions are, in fact, legal fictions and therefore relatively unsatisfactory. It should however be mentioned that some legal systems have explored the possibility of a legal basis within tort law.[17]

This third concept is the final, and perhaps the most unusual, of the three central concepts studied in our book.

3. The Legal Systems Studied

Finally, we must provide a few words of explanation about the legal systems studied. Within our book, the reader will find chapters on unauthorized agency in France, Belgium, Germany, the Netherlands, England, the United States, Scotland, South Africa, the PECL, and the UNIDROIT Principles of International Commercial Contracts 2004.

At first sight, this may seem to be a strange and random grouping. As already explained, our principal aim was the search for common European rules. It was therefore important to include major European systems such as France and Germany. The Netherlands provided the opportunity to analyse a relatively modern and sometimes innovative civil code. Belgian law often, but not always, followed the lead provided by French law. The PECL, as a highly influential contract 'code' undoubtedly merited a place in our project, given that they form the basis of development of a Common Frame of Reference for Europe. The inclusion of the major common law system within Europe, England, completed our European picture. We have included two legal systems which are 'mixed' in the sense that an initial and strong civil law

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[16] Busch & Macgregor, 421.

[17] Busch & Macgregor, 421–424.

base has been overlaid with English influence.[18] They are Scotland and South Africa. Their inclusion allows us to inquire whether systems which stand between Europe's two great legal traditions might have some distinctive contribution to make to the problems of unauthorized agency.

To summarize, in selecting the legal systems to participate in this project, our dominant motive was indeed to identify the 'common core' of European agency law. A further motive was to view agency law through the different lenses of the common law, the civil law, and mixtures of the same.

So far, we have mentioned only one common law system: England. A balanced comparison clearly required the participation of more common law systems. We were very pleased to secure the participation in our project of two of the leading agency lawyers from the common law world. First of all, Deborah de Mott, the Reporter to the *Restatement (Third) of Agency*, agreed to submit a chapter on the Restatement. There we find a valuable discussion of a new and innovative common law system of unauthorized agency. Second, we were equally pleased that Francis Reynolds was willing to contribute a chapter which would form a 'bridge' between the English and American chapters.

[18] See on mixed legal systems, inter alia, J. du Plessis, 'Comparative Law and the Study of Mixed Legal Systems', in *The Oxford Handbook of Comparative Law*, ed. M. Reimann & R. Zimmermann (Oxford: Oxford University Press, 2006), 477–512; du Plessis, 'The Promises and Pitfalls of Mixed Legal Systems: The South African and Scottish Experiences', Stell LR (1998): 338 at 339; and N.R. Whitty, 'The Civilian Tradition and Debates on Scots Law', TSAR 227 (1996): 442 at 457.